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No. 09-442

IN THE

Supreme Court of the United States

ONEIDA LTD.,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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Oneida's petition demonstrated that the circuit courts of appeals disagree on whether bankruptcy law or non-bankruptcy law determines that a contingent claim is a pre-petition claim subject to compromise or discharge in a bankruptcy proceeding. Pet. 8-14.

In opposition, PBGC does not dispute the existence of the conflict among the circuit courts of appeals, the importance of that conflict to the fair administration of our nation's bankruptcy laws, or the need to resolve the conflict in an appropriate case. Opp. 8-10. Instead, PBGC contends that this case is not an appropriate "vehicle for resolving that conflict" (*id.* at 12), for two reasons. First, PBGC contends that the

"conflict . . . is not present in this case" (*id.* at 8) because the conflict is whether bankruptcy law or non-bankruptcy *state* law determines that a contingent claim is a pre-petition claim (*id.* at 1 ("conflicts over . . . state law tort and contract liabilities"); *see id.* at 8-10). The Termination Premiums imposed by the DRA in this case arise under federal law. Second, PBGC contends that resolving the conflict "would not dispose of this case" (Opp. 12) because "a federal statute explicitly provides that the liability under the statute applies only upon the debtor's discharge or dismissal from bankruptcy" (*id.* at 10).

Contrary to PBGC's contentions, this case is the ideal vehicle to resolve the conflict whether bankruptcy law or non-bankruptcy law determines that a contingent claim is a pre-petition claim. Although PBGC contends that the conflict is limited to "state law tort and contract liabilities" (Opp. 1), one of the circuit courts on the majority side of the conflict held that a federal CERCLA claim was contingent and therefore barred as a matter of bankruptcy law notwithstanding ***federal*** non-bankruptcy law. *In re Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 974 F.2d 775, 785-86 (7th Cir. 1992) (cited at Pet. 10 and Opp. 9 n.32). The conflict is thus not limited to state non-bankruptcy law. The Second Circuit's decision below directly conflicts with the Seventh Circuit's decision that bankruptcy law controls whether a claim is subject to discharge.

PBGC's second contention – that non-bankruptcy law should "dispose of this case" (Opp. 12) in the majority of circuits because it is "explicit[]" (*id.* at 10) – simply disregards the reasoning of those circuits that bankruptcy law controls whether a contingent claim is a pre-petition claim. In the view of the

majority of the circuit courts, whether state or federal non-bankruptcy law is explicit, indefinite, or even incomprehensible is irrelevant to classifying the contingent claim as pre- or post-petition. Bankruptcy law controls that determination because of the breadth of the "claim" definition in 11 U.S.C. § 101(5) and the objective of including all assets and claims within the bankruptcy estate in order to fairly allocate them among creditors and give the debtor a fresh start. Far from being a reason to decline review, to the extent the non-bankruptcy law at issue here is "explicit[]" (Opp. 10), the conflict among the circuits is presented at its sharpest and this case is the perfect vehicle to resolve the division.

By referring to the "explicit" and "express" nature of ERISA's special rule 12 times (Opp. i, 1, 9, 10, 11 & n.37, 13, 16), PBGC seems to suggest that Congress has decided that Termination Premiums are not "claim[s]" within the meaning of the Bankruptcy Code, 11 U.S.C. § 101(5), and that the law used by the circuit courts to determine whether obligations are pre-petition claims in other contexts has no application to Termination Premiums. PBGC's suggestion may be superficially seductive, but it is demonstrably wrong as a matter of federal bankruptcy law because it constitutes an implied amendment of the definition of "claim." As Oneida explained in its petition, "PBGC did not contend that the DRA impliedly amended the Bankruptcy Code" in either court below, and "implied amendment would conflict with this Court's clear-statement requirement for amendments to the Bankruptcy Code." Pet. 13-14 (citing *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 219 (1996)). PBGC never answers the petition on those points. It never explains the legal significance of supposed clarity of ERISA's special rule. It does

not cite, let alone distinguish, this Court's decision in *Reorganized CF & I Fabricators of Utah*. And "PBGC agrees" (explicitly and expressly) that "Congress did not 'impliedly' amend the Bankruptcy Code." Opp. 13. The "explicit" and "express" nature of the DRA's (later ERISA's) special rule thus does not take this case outside the conflict among the circuit courts of appeals or provide an independent ground for the judgment below.

This case presents an ideal vehicle to resolve a conflict on an important and recurring issue of bankruptcy law that now involves eight of the circuit courts of appeals and that has bedeviled the circuit courts for twenty-five years. Given the critical importance of the bankruptcy laws in these times of economic distress, and especially the threshold issue of which "claim[s]" are pre-petition and subject to compromise or discharge in bankruptcy, this Court should grant plenary review.

I. THIS CASE PRESENTS A DIRECT CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS

PBGC contends that the "conflict" whether bankruptcy law or non-bankruptcy law controls the pre- or post-petition character of a contingent claim "is not present in this case" (Opp. 8) because the conflict is limited to "state law tort and contract liabilities" (*id.* at 1; *see id.* at 8-10). Both parties agree that the Termination Premiums are imposed by federal law.

Contrary to PBGC's contention, the circuit courts disagree on whether bankruptcy law or non-bankruptcy law controls the pre- or post-petition character of a contingent claim even if the non-bankruptcy law is federal rather than state law. On the majority side

of the conflict, as identified in Oneida's petition (Pet. 10), and as PBGC tacitly admits in a footnote (Opp. 9 n.32), the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 974 F.2d 775, applied bankruptcy law to hold that a ***federal CERCLA obligation*** was a contingent claim and therefore barred, notwithstanding that the CERCLA obligation had not yet accrued because no response costs had yet been incurred (974 F.2d at 785-86):

> WSDOT argues that because a party must incur response costs in order to have a CERCLA cause of action, a party likewise must incur response costs before it has a dischargeable claim for purposes of Section 77 [of the Bankruptcy Act of 1898, 11 U.S.C. § 205 (replaced by 11 U.S.C. § 101(5) of the current Bankruptcy Reform Act of 1978)]. . . . The problem, however, is that parties are often obligated to bring contingent claims in order to avoid discharge in a Section 77 proceeding, and as such the fact that response costs are necessary for an actual claim to accrue under CERCLA does not necessarily mean that such costs are necessary for a contingent CERCLA claim to accrue under Section 77.
>
> . . .
>
> [R]ather than adopting such a[n accrual] rule, or any rule, we explain below that when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim for purposes of Section 77.

In a revealing footnote (Opp. 9 n.32), PBGC acknowledges that the Seventh Circuit's decision rejecting the accrual rule of *In re M. Frenville Co., Inc.*, 744 F.2d 332, 337 (3d Cir. 1984), applied bankruptcy law to bar a "CERCLA" claim notwithstanding such "***federal*** non-bankruptcy law" (emphasis added). In addition, the Ninth Circuit's decision in *In re Jensen*, 995 F.2d 925 (9th Cir. 1998) (*per curiam*), although it "discharged" a "contingent claim for cleanup costs" arising under California law (*id.* at 931), relied primarily on the reasoning of federal CERCLA decisions (*id.* at 928-31).

The Second Circuit's decision below conflicts not only with the Seventh Circuit's decision, but also with the five other circuits that constitute the majority view that bankruptcy law determines whether an obligation is a "claim" for purposes of a bankruptcy proceeding and the pre- or post-petition nature of that claim. In the petition (Pet. 13), Oneida remarked that the Second Circuit "offered no principle to distinguish between federal and non-federal non-bankruptcy law." In its opposition, PBGC offers no reason why the source of the non-bankruptcy law should make any difference to the determination whether an obligation is a "claim" subject to compromise and discharge in a bankruptcy proceeding. The Ninth Circuit's decision in *Jensen*, which relies on decisions involving both federal and state environmental obligations, suggests that the source of law is a distinction without a difference.

PBGC ultimately appears to agree that the choice is between bankruptcy law and non-bankruptcy law, regardless of whether the non-bankruptcy law is federal or state. After arguing in point I of the opposition that no conflict exists (Opp. 8-12), PBGC argues

in point II that "substantive non-bankruptcy law . . . determines the existence and validity of a bankruptcy claim for that obligation" (Opp. 12) (footnote omitted). That position, of course, directly conflicts with the decisions of the six circuit courts of appeals in the majority. Pet. 10-11. That position is also the legal theory proposed by PBGC in the court below (Pet. 6; PBGC C.A. Br. 2, 4-5, 18, 27) and adopted by the Second Circuit (Pet. App. 4a-5a ("[t]o make these determinations [of 'whether the claimant possessed a right to payment' and 'whether that right arose before the filing of the petition'] we look to the substantive non-bankruptcy law that gives rise to the debtor's obligation" (internal citation omitted))). The conflict is direct and glaring.

To be sure, this case is the first manifestation of the conflict in the context of Termination Premiums. Opp. 1, 12, 14. But given the opportunities for forum shopping (Pet. 15) and the pressures to settle disputes, this Court cannot confidently wait for a later case on precisely the same contingent claim. Nor does PBGC explain why, after 25 years of cases involving eight circuit courts and multiple contingent claims, additional decisions are required to illuminate the acknowledged conflict. Moreover, although the conflict is not discussed by the Second Circuit below (Opp. 9), the court's reasoning leaves no doubt that its decision follows the Third Circuit's decision in *Frenville* and conflicts with the decisions of the courts of appeals for the Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits that are openly critical of *Frenville*. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions") (citations omitted); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court, however, reviews

judgments, not statements in opinions.") (citations omitted); *McClung v. Silliman*, 6 Wheat. 598, 603 (1821) ("The question before an appellate Court is, was the *judgment* correct . . . .") (emphasis Court's).

II. RESOLUTION OF THE CONFLICT IN FAVOR OF THE MAJORITY VIEW WOULD REVERSE THE JUDGMENT BELOW

The Second Circuit relied on "substantive non-bankruptcy law" (Pet. App. 4a-5a) to determine that the Termination Premiums were post-petition claims. If bankruptcy law had applied instead, then Oneida's Termination Premiums would plainly have been pre-petition contingent claims subject to compromise or discharge. The Bankruptcy Code contains a broad definition of "claim." 11 U.S.C. § 101(5). That definition includes "contingent" claims. *Id.* § 101(5)(A). Applying the pre-petition relationship "claim" test to the bankruptcy court's undisturbed factual finding of a pre-petition relationship compels the conclusion, under the majority view, that Oneida's Termination Premiums are pre-petition claims subject to compromise and discharge in bankruptcy. Pet. 12-13.

PBGC does not dispute that application of bankruptcy law would require reversal of the judgment below. Instead, it contends that non-bankruptcy law should "dispose of this case" (Opp. 12) – presumably, even in the majority of circuits that apply bankruptcy law rather than substantive non-bankruptcy law – because the non-bankruptcy law imposing the Termination Premiums is so "explicit[]" (Opp. 10). PBGC seems to think that the pre-petition relationship test and other statutory interpretations of the "claim" definition in 11 U.S.C. § 101(5) are "federal common law rules" (Opp. 9) that are "demolished" by the DRA

because the latter statute "directly address[es] the matter" (Opp. 11). *See id.* at 8-12.

By interpreting the definition of "claim" in the Bankruptcy Code, however, the majority of circuit courts engaged in statutory interpretation, not the creation of federal common law. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 607 (6th ed. 2009) (defining federal common law as "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands"). The reasoning in the majority decisions applies traditional methods of statutory interpretation. PBGC offers no authority to suggest that the majority is making federal common law. And we are aware of no decision of this Court that has held that interpreting an Act of Congress (such as the definition of "claim" in the Bankruptcy Code) creates federal common law. The premise of PBGC's argument – that the circuit court decisions in the majority rest on judge-made federal common law that must give way to a statute enacted by Congress – is false, and its conclusion – that the judgment below is independent of the conflict among the circuit courts – does not follow.

As explained above (*supra* p. 3), PBGC's repeated refrain that ERISA's special rule is "explicit" and "express" (Opp. i, 1, 9, 10, 11 & n.37, 13, 16) does not support an implied amendment of the "claim" definition to create a new category of non-dischargeable claims. PBGC did not argue for an implied amendment in either court below and does not defend an implied amendment here. Opp. 13. Because PBGC mentions the specificity of the special rule so many

times, however, it is important to note why the specificity of a subsequent statute does not control treatment of Termination Premiums as a matter of bankruptcy law.

For exceptions to discharge adopted as part of non-bankruptcy laws to be recognized in bankruptcy, the Bankruptcy Code itself must be reciprocally amended. *See United States v. Reorganized CF&I Fabricators of Utah*, 518 U.S. at 219. Even though Congress amended the Bankruptcy Code to create several new non-dischargeable debts only months before adopting the DRA Amendment, Congress provided "no direction that the DRA Premium [was] not [to] be considered a claim under the Bankruptcy Code." Pet. App. 26a; *see id.* at 24a-28a. Congress did not do so even though at least one of the new non-dischargeable debts related to pension and ERISA matters. 11 U.S.C. § 523(a)(18) (excepting from discharge obligations on loans taken from pension plans "as permitted under Section 408(b)(1) of the Employee Retirement Income Security Act of 1974"). Although the special rule might be sufficiently "explicit" (Opp. 10, 11 & n.37, 13) in other contexts, the absence of a reciprocal amendment means that it is not explicit for purposes of the Bankruptcy Code. *See PBGC v. CF&I Fabricators of Utah, Inc. (In re CF&I Fabricators of Utah, Inc.)*, 150 F.3d 1293, 1297 (10th Cir. 1998) ("As we read the [Supreme] Court's analysis [in *CF&I Fabricators*], the key to whether a statutory provision is 'explicit' in this context is whether the *Bankruptcy Code* adopts and makes specific reference to the provisions of the other law.") (emphasis court's).

* * * * *

PBGC's remaining arguments pertain to the merits (*e.g.*, the committee report and floor statements dis-

cussing ERISA's special rule, Opp. 5 & nn.16-17) or matters of public policy (*e.g.*, PBGC's deficit and its need to collect Termination Premiums, Opp. 2, 15-16). Oneida would address those merits and policy arguments on plenary review.* In the meantime, Oneida suggests that the public policy arguments on

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* One comment is appropriate at the petition stage in response to PBGC's citation of recent bankruptcy filings in the District of Delaware and the Southern District of New York as proof that debtors with "substantial pension obligations" (Opp. 14 n.47) have not shopped for forums outside the Second and Third Circuits. Needless to say, substantial pension obligations provide no reason for debtors to engage in forum shopping. Substantial *Termination Premiums* provide the financial incentive for forum shopping. Although PBGC lists seven recent bankruptcy filings, it does not represent that any of the debtors faced substantial Termination Premiums that they might have avoided by filing in a bankruptcy court in a district outside the Second and Third Circuits. The two largest bankruptcies involved GM and Chrysler. Neither debtor faced Termination Premiums because both had federal bail-outs and their pension plans were transferred along with their productive assets to the bailed-out companies. *See* http://www.pbgc.gov/workers-retirees/auto-sector.html. The auto parts suppliers and theme park debtors likewise faced no Termination Premiums because they filed for bankruptcy, not to terminate their pension plans, but to reduce their leverage. *See, e.g.*, Ryan Beene, *Lear Posts Profit After Emerging from Bankruptcy*, CRAIN'S DETROIT BUSINESS (Nov. 11, 2009), available at http://www.plasticsnews.com/headlines2.html?id=17122&channel=82 ("Lear's four-month trip through bankruptcy . . . removed about $2.8 billion of debt from its balance sheet. . . . [Lear] continued to fund its pension plan."); Tom Hals, *Former Execs Offer to Manage Bankrupt Six Flags*, Reuters.com (Aug. 18, 2009), http://www.reuters.com/article/euMergersNews/idUSN1842564320090818 ("[Larry Cochrane, former chairman of Six Flags, Inc.,] said the bankruptcy resulted from too much debt."); Tim Hicks, *Mark IV Files Chapter 11 Petition*, THE PEOPLE-SENTINEL (May 14, 2009), *available at* http://www.thepeoplesentinel.com/news/mark-iv-files-chapter-11-petition ("The company was overleveraged.").

both sides are a further consideration, in addition to the long-standing conflict among the circuit courts of appeal, that weighs in favor of this Court's review.

CONCLUSION

For the foregoing reasons and those in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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